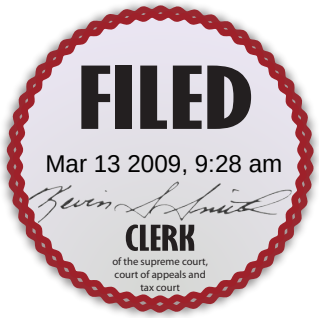

ATTORNEY FOR APPELLANT:

PAUL J. WATTS
Watts Law Office, P.C.
Spencer, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GLENN CULLER,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 11A01-0807-PC-330
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE CLAY SUPERIOR COURT
The Honorable J. Blaine Akers, Judge
Cause No. 11D01-0202-FC-955

March 13, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF CASE

Appellant-Petitioner, Glenn Culler (Culler), appeals the trial court's denial of his petition for post-conviction relief.

We affirm.

ISSUES

Culler raises two issues, which we restate as follows:

(1) Whether the post-conviction court erred by not finding that his trial attorney had provided ineffective assistance of counsel by:

(A) failing to draw out inconsistencies in his child accusers' testimony;

(B) failing to properly cross-examine the State's expert witness;

(C) not making a proper offer of proof regarding evidence ruled inadmissible hearsay by the trial court;

(D) attempting to have a witness certified as an expert who was not qualified;

(E) failing to call a witness to support his alibi defense; and

(2) Whether the post-conviction court erred by not finding that his appellate attorney provided ineffective assistance of counsel by failing to allege that Culler's trial counsel provided ineffective assistance of counsel.

FACTS AND PROCEDURAL HISTORY

On January 21 and 22, 2004, a jury trial was held on charges that Culler had molested his daughter and two nieces. During the trial, Culler's trial counsel presented defenses that the children's testimony had been coached and that his ex-wife had induced the children to

make the accusations as a form of revenge. On January 22, 2004, the jury found Culler guilty and he was convicted of three counts: Count I, child molesting, as a Class A felony; Count II, child molesting, as a Class C felony; and Count III, child molesting, as a Class C felony. On February 18, 2004, the trial court sentenced Culler to fifty years for Count I, eight years for Count II, and eight years for Count III, all sentences to be served consecutively. Culler appealed, and we reversed and remanded his sentence. *Culler v. State*, No. 11A05-0403-CR-134 (Ind. Ct. App. Dec. 19, 2004). On May 22, 2006, the trial court resentenced Culler to thirty years on Count I, four years on Count II, and four years on Count III, all sentences to be served concurrently.

On January 17, 2007, Culler petitioned for post-conviction relief. The post-conviction court summarily denied the petition on March 26, 2007. We reversed and remanded for a hearing on the petition. *Culler v. State*, No. 11A04-0705-PC-239 (Ind. Ct. App. Dec. 12, 2007). On June 12, 2008, the post-conviction court issued findings of facts and conclusions of law which noted the following evidence in favor of the State:

> Three [] eyewitness victims testified against [Culler]. The nurse practitioner confirmed that there was medical evidence to support [Culler's] daughter's testimony that [Culler] had intercourse with her. The testimony of the three victims corroborated each other. [Culler] himself admitted to skinny-dipping with the niece victims and that he had touched their vaginas.

(Appellant's App. p. 22). The post-conviction court concluded that, although some other attorneys may have chosen alternative trial strategies, Culler's trial counsel's performance did not fall below an objective standard of reasonableness. Further, the post-conviction court concluded that Culler's appellate attorney's decision to not allege Culler's trial counsel

ineffective during direct appeal was an appellate strategy for which he could not be ineffective. Accordingly, the post-conviction court denied Culler's petition for post-conviction relief.

Culler now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Standard of Review*

Post-conviction hearings do not afford defendants the opportunity for a "super appeal." *Moffitt v. State*, 817 N.E.2d 239, 248 (Ind. Ct. App. 2004), *trans. denied*. The petitioner has the burden of establishing the grounds for post-conviction relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *see also id.* Because Culler is appealing from a negative judgment, to the extent his appeal turns on factual issues, he must provide evidence that as a whole unerringly and unmistakably leads us to believe there is no way within the law that a post-conviction court could have denied his post-conviction relief petition. *See Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *reh'g denied, cert. denied*, 540 U.S. 830 (2003). It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law. *Godby v. State*, 809 N.E.2d 480, 482 (Ind. Ct. App. 2004), *trans. denied*.

All of Culler's claims for post-conviction relief relied upon his theories that either his trial or appellate counsel provided ineffective assistance of counsel. To establish a violation of the right to effective counsel as guaranteed by the Sixth Amendment, petitioners typically

must establish both prongs of the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *reh'g denied*, namely that counsel performed deficiently and the deficiency resulted in prejudice. *Lee v. State*, 892 N.E.2d 1231, 1233 (Ind. 2008). This is true for both claims of ineffective assistance of trial and appellate counsel. *Bieghler v. State*, 690 N.E.2d 188, 193 (Ind. 1997). The defendant must prove (1) his or her counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's failure to meet prevailing professional norms, the result of the proceeding would have been different. *Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *reh'g denied, trans. denied* (citing *Strickland*, 466 U.S. at 690). Because all criminal defense attorneys will not agree on the most effective way to represent a client, "isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." *Bieghler*, 690 N.E.2d at 199. Thus, there is a strong presumption that counsel rendered adequate assistance and used professional judgment. *Timberlake v. State*, 753 N.E.2d 591, 603 (Ind. 2001). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.*

II. *Effectiveness of Trial Counsel*

A. *Cross Examination of the Child Victims*

Culler first contends that his trial counsel was ineffective for failing to thoroughly cross-examine the child victims. He argues that there were clear inconsistencies and

contradictions in the testimony of his two nieces, S.C. and N.C., which Culler's trial counsel did not highlight on cross examination.

The first example of an inconsistency Culler alleges in his brief involved an instance of skinny dipping with Culler that they each described at trial. Culler points out that S.C. testified that Culler got on top of her and her sister in the water "like he was playing horse." (Jury Trial Transcript p. 77). N.C. did not mention Culler getting on top of them in the water.

However, both nieces recounted for the jury many similarities regarding this event. They consistently testified that this was the second instance where Culler had asked them to swim naked; the first time Culler just watched. Both testified that Culler drove them to a creek located on his property on a four wheeler, had them take off their clothes when they got there, and took off his clothes as well. Both testified that, while in the water, he took each of their hands and placed them on his penis, and after they got out of the water, he dried them off with his shirt, touching their vaginas.

The second instance of inconsistency relied on by Culler in support of his argument is that S.C. testified that Culler and the two nieces were lying in bed and Culler rubbed "his penis against [her] butt." (Jury Trial Tr. p. 48). She explained that her sister fell off of the bed and left the room to go watch television in another room. N.C. testified about the same incident by stating that she was in the room lying on the bed when Culler rubbed his penis on S.C.'s butt. However, N.C. mentioned nothing about falling off the bed or watching television in another room.

The sisters testified consistently about this event in many ways too. They both testified that this event happened the night that the second skinny dipping incident occurred. They both recounted that Culler had them take a bath together while he watched. They both described how Culler had them get out of the tub, laid on the floor of the bathroom with his penis pulled out of his pants, asked N.C. to get on top of him, but she said no because she was "too heavy." (Jury Trial Tr. pp. 46, 64). Culler then had S.C. sit on top of him while he rubbed his penis on her butt. After this, the sisters got into bed, and Culler climbed into bed with them and pulled his penis out of his pants.

Culler also contends that each niece contradicted her own testimony. S.C. testified that the first people she told about the events were her mother and father, but then went on to explain that N.C. had told someone who told their mom. Culler also directs our attention to N.C.'s response to a question asked regarding the second skinny dipping incident: "Did you touch [Culler] while you were in the creek?" (Jury Trial Tr. p. 95). N.C. responded to that question, "No. I mean yes," and then went on to explain "[h]e pulled my hand first and then [S.C.]'s to his penis." (Jury Trial Tr. p. 95).

Altogether, we are hesitant to characterize most of what Culler has alleged to be inconsistencies or contradictions as being such. Anytime multiple witnesses recount a series of events, they likely will not recount each and every step in the series exactly the same; one may omit some fact that might stick out in the mind of another. Further, examining the two instances in which Culler claims the nieces contradicted themselves, there is no contradiction in S.C.'s account, and N.C. may have misspoke and then immediately corrected herself.

However, for the sake of argument, we will accept Culler's contentions of inconsistencies and contradictions.

At the post-conviction hearing, Culler's trial counsel testified that he was aware of discrepancies between the nieces' testimony, but did not cross-examine them on those discrepancies because he believed they "had been coached so well that every word out of their mouth was harmful to [Culler]. And, and I didn't feel like giving the prosecution any more information . Any more ammunition." (PCR Tr. p. 41). For the purpose of ineffective assistance of counsel claims, we note that "[c]ounsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference." *Young v. State*, 746 N.E.2d 920, 926 (Ind. Ct. App. 2001). Even the finest and most experienced criminal defense attorneys may not agree on the ideal strategy or the most effective way to represent a defendant. *Id*. It is apparent that the testimony of the nieces was mostly in corroboration and particularly damning to Culler. Moreover, the testimony Culler describes as being inconsistent and contradictory was before the jury without cross-examination, but the jury still found the nieces testimony to be credible. As such, Culler's trial counsel's decision to limit cross-examination in order to prevent further harm to Culler's defense was clearly a trial strategy and not deficient performance, and Culler has not demonstrated any prejudice.

B. *Cross-Examination of the State's Expert*

Culler contends that his trial counsel was ineffective for failing to appropriately cross-examine the nurse practitioner who had performed a pelvic examination of his daughter, A.C. The nurse practitioner openly conceded both on direct and cross that the signs she had found

which she believed corroborated A.C.'s accusation that Culler had intercourse with her were not conclusive because they could have been the same even if A.C. was a virgin. Culler seems to contend that although this information was openly presented to the jury, his trial counsel should have belabored the point. However, we conclude that since this information was presented to the jury, Culler has not proven any prejudice.

C. *Hearsay Evidence*

Next, Culler contends that his trial counsel was ineffective for offering hearsay testimony which was excluded and then failing to make an offer of proof "to develop the circumstances under which [the declarant's] statement was made pursuant to Ind. Evidence Rule 803(2), her emotional state pursuant to Evid. R. 803(3) or to develop her bias pursuant to Evid. R. 616." (Appellant's Br. p. 9). However, Culler did not call the witness whose testimony was excluded at the post-conviction hearing to testify as to what the excluded evidence would have been. Rather, at the post-conviction hearing he merely asked trial counsel if it was while pursuing a certain line of questioning that he asked the question soliciting the hearsay statement. The witness' response could have been inculpatory, immaterial, or irrelevant. Because Culler did not present any evidence at the post-conviction hearing as to what the excluded statement would have been, we cannot find any prejudice in this instance.

D. *Trial Counsel's Offer of an Expert*

Culler contends that his trial counsel was ineffective by attempting to have John Cogswell (Cogswell) certified as an expert witness. Culler's argument seems to be that

Cogswell was not qualified to be an expert, and by attempting to have Cogswell deemed to be an expert for the purposes of testifying as to his opinion of whether the child victims were being truthful, Culler's trial counsel prejudiced him. However, Culler's trial counsel elicited in front of the jury the facts that Cogswell was a certified teacher who had received training in psychology, and as a part of his teaching duties, had performed preliminary counseling tasks which included determining whether children had or had not been sexually molested. Despite the fact that trial court rejected Cogswell as an expert witness, Culler's trial counsel's elicitation of these facts before the jury may have bolstered Cogswell's credibility.

Culler further contends, "[l]ikewise, [trial counsel] made no attempt to present Mr. Cogswell's non-hearsay observations or to present some of his testimony as a lay witness." (Appellant's Br. p. 10). However, this is a patent mischaracterization of the record. Cogswell testified that he knew Culler very well, that he had observed him as a father, and had observed his family. He testified that Culler was an excellent father and was "[a]bsolutely not" capable of committing the acts which he was charged with. (Jury Trial Tr. p. 170). He explained that at the time of Culler's divorce, Culler's ex-wife told him "she was going to make [Culler's] life hell and make him pay dearly." (Jury Trial Tr. p. 166). This testimony was key to Culler's defense that the accusations were all a part of his ex-wife's attempt at revenge.

At the post-conviction hearing, Culler's trial counsel testified that Cogswell had "testified to everything that we wanted him to testify to." (PCR Tr. p. 35). Altogether, we

fail to see how Culler's trial counsel's attempt to have Cogswell deemed an expert witness constituted deficient performance or prejudiced Culler in any way.

E. *Alibi Witness*

Finally, on this issue, Culler contends that his trial counsel was ineffective for failing to call an alibi witness. However, Culler did not present any of those alleged potential alibi witnesses at the post-conviction hearing to prove that such witnesses were available or could establish a credible alibi that would refute the evidence presented against Culler. As Culler's trial counsel pointed out during the post-conviction hearing, the allegations facing Culler were mostly based on incidents that occurred over a period of time, but were not based on any specific dates. Altogether, we conclude that Culler failed to prove that his trial counsel's performance was deficient because he did not call an alibi witness, nor has Culler proven that he was prejudiced any way.

III. *Effectiveness of Appellate Counsel*

Culler's sole contention is that his appellate counsel was ineffective for failing to allege his trial counsel was ineffective. We first note that a claim that appellate counsel is ineffective for failing to allege trial counsel was ineffective would be difficult to prove because "a postconviction hearing is normally the preferred forum to adjudicate an ineffectiveness claim." *Woods v. State*, 701 N.E.2d 1208, 1219 (Ind. 1998) *reh'g denied*, *cert. denied*, 528 U.S. 861 (1999). Therefore, such a claim will likely fail because appellate counsel's decision will be considered one of reasonable strategy. *See Williamson v. State*, 798 N.E.2d 450, 453 (Ind. Ct. App. 2003), *reh'g denied, trans. denied*. Or, the claim will

likely fail because the issue would not be clearly stronger than the issues presented. *See Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001), *cert. denied*, 535 U.S. 1019 (2002). However, since we have concluded that Culler failed to prove that his trial counsel was ineffective, Culler has also failed to demonstrate any prejudice due to his appellate counsel not alleging trial counsel ineffective on direct appeal, and we need not consider this issue further.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not err when it denied Culler's petition for post-conviction relief.

Affirmed.

DARDEN, J., and VAIDIK, J., concur.